FILED
DEC 19 1975

BRIEF FOR RESPONDENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, ET AL., *Petitioners,*

v.

ALFRED E. DAVIS, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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December 20, 1975

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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United States Civil Service Commission, Federal Personnel Manual, Examining, Testing, Standards, and Employment Practices, Sub. Chap. S3-2, 37 Fed. Reg. 21558 (October 12, 1972), CCH Emp. Prac. Guide § 3890, 3892.06-12 .....29, 42

United States Department of Labor, Office of Federal Contract Compliance, Testing and Selecting Employees by Government Contractors, 41 C.F.R. § 60-3.5, CCH Emp. Prac. Guide § 4350, 4350.05.. 42

OTHER AUTHORITIES:

A. ANASTASI, PSYCHOLOGICAL TESTING (3d ed. 1968) .32, 38-39

L. CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING (3d ed. 1970) 38

District of Columbia Metropolitan Police Department, Subgrantee Progress Report, submitted to Office of Criminal Justice Planning (July 11, 1973) ... 35

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Report No. 92-238, House Committee on Education and Labor (92nd Cong., 1st Sess., 1971) 37

Report No. 92-415, Senate Committee on Labor and Public Welfare (92nd Cong., 1st Sess., 1971).... 37

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BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

1. Whether Test 21, administered by the District of Columbia Police Department to applicants for employment, has a substantial adverse impact on blacks?

2. Whether the Police Department has shown any legitimate justification for its use of Test 21?

COUNTERSTATEMENT OF THE CASE

I. PROCEEDINGS BELOW

Respondents George Harley and John Dugan Sellers are two black men who were disqualified from appointment to the Metropolitan Police Department of the

District of Columbia ("MPD") because of their failure to achieve a passing score on the United States Civil Service Commission's "Test 21." Following their rejection, respondents instituted this class action against the Mayor and the Chief of Police of the District of Columbia and the members of the Civil Service Commission, alleging that the Test 21 requirement was racially discriminatory.[1]

The case was decided in the district court in favor of the defendants on cross motions for summary judgment. These motions followed a year and a half of discovery, and the exhibits filed in support of the motions of the parties included the three versions of Test 21 (App. 209-278), complete racial impact data for a four-year period (App. 32-35), a study of the validity of the Test produced by the defendants (App. 99-109), expert affidavits from both sides commenting on the defendants' evidence of validity (App. 49, 53, 172, 178, 185, 187, 201, 205), and other related material submitted by both sides. (App. 58, 66, 110, 209.) In its

[1] App. 24-29. Specifically, Respondents were permitted to intervene in behalf of a class as plaintiffs in *Davis, et al.* v. *Washington, et al.*, Civil Action No. 1086-70 (D.D.C.), a then pending case involving claims of racial discrimination by the MPD in its promotional policies. The issue of the legality of the applicant test—Test 21—was decided on a Motion for Summary Judgment in advance of the trial of the issues in the original *Davis* case, and a separate appeal was taken. Subsequently, the promotional issues in the *Davis* case were decided in favor of the MPD. 357 F. Supp. 187 (1972). No appeal was taken from that decision.

In this brief, for purposes of clarity, the parties are referred to by their designations in the district court, "plaintiffs" (respondents) and "defendants" (petitioners). The abbreviation "App. ——" refers to the printed Appendix in this Court. "C.A. ——" refers to the Appendix to the Petition for a Writ of Certiorari, where the opinions of the court of appeals and of the district court are reprinted.

memorandum opinion, the district court found that Test 21 had disproportionately adverse racial impact, but upheld the test requirement on the ground that the defendants had established the validity of its use. CA. 48-52; see CA. 46.

The court of appeals reversed. In his opinion for a majority of the panel, Judge Robinson sustained the finding of adverse racial impact and also held that Test 21 had not been shown valid by the defendants for any legitimate purpose. CA. 1-19. Judge Robb dissented.[2] On October 6, 1975, this Court granted the petition of the District of Columbia defendants for a writ of certiorari to review the decision of the court of appeals.[3]

II. RACIAL IMPACT OF TEST 21

The requirements for appointment to the MPD are graduation from high school, certain physical characteristics, successful results on a psychiatric examination and on a character investigation, and a passing score on Test 21. CA. 48. Test 21 was developed by the Civil Service Commission for use "generally throughout the federal service," purportedly as a test of "verbal ability." *Id.* The Test has 80 multiple choice questions. An applicant to the MPD is disqualified from any further consideration unless he scores 40 correct. *Id.*

The Record in this case contains statistical data concerning the racial impact of Test 21 from 1968 through

[2] CA. 19-21. Judge Robb did not say that the defendants had proved validity, but took the view that Test 21 "is job related on its face." CA. 21.

[3] No petition for a writ of certiorari was filed on behalf of the members of the Civil Service Commission.

1971 and demonstrates a highly adverse impact on black candidates. These data are summarized in the text that follows, and, for the convenience of the Court, are fully compiled in a series of footnote Tables, I through V, in the pages that follow.

During this period, 87.0% of the white applicants and only 43.7% of the black applicants passed the Test.[4] At the white pass rate, 4,696 additional black applicants would have qualified.[5] The disparity in pass rates is statistically significant to an unusually high degree.[6]

The Record also contains complete data on hiring. Over the same four-year period, 33.0% of the white applicants and 17.4% of the black applicants were

[4] Table I—Test 21—Pass/Fail Data, by Race, 1968-1971

Year	No. Tested		No. Passed	
	Blacks	Whites	Blacks	Whites
1968	1,695	861	773 (*45.6%*)	729 (*84.7%*)
1969	2,499	1,055	1,035 (*41.4%*)	892 (*84.5%*)
1970	4,178	3,848	1,866 (*44.7%*)	3,375 (*87.7%*)
1971	2,482	1,981	1,073 (*43.2%*)	1,746 (*88.1%*)
Totals:	10,854	7,745	4,747 (*43.7%*)	6,742 (*87.0%*)

App. 34.

[5] This figure is a computation from the totals in Table I.

[6] In the district court, plaintiffs filed an affidavit by C. Terrence Ireland, an Associate Professor of Statistics at George Washington University, concerning the statistical significance of the difference between black and white performance on Test 21. App. 58-63. Using professionally accepted means, Dr. Ireland calculated that "the probability that a racially neutral selection device could have produced [the white/black disparities shown in this Record] or a more disproportionate level of results, *i.e.*, that it could have been obtained by chance," was "less than one chance in 10 to the 703rd power." App. 62. He added that it was "extremely rare for a statistician to work with probabilities so small." App. 62.

hired.[7] Tables III and IV below restate this data in terms of the racial proportions of the applicant pool,[8]

[7] Table II—Number and Percentage of Applicants Hired, by Race, 1968-1971

Year	Applicants		Hires		% of Applicants Hired	
	Blacks	Whites	Blacks	Whites	Blacks	Whites
1968	1,695	861	300	502	*17.7%*	*58.3%*
1969	2,499	1,055	495	596	*19.8%*	*56.5%*
1970	4,178	3,848	767	1,015	*18.4%*	*26.4%*
1971	2,482	1,981	328	443	*13.2%*	*22.4%*
Totals:	10,854	7,745	1,890	2,556	*17.4%*	*33.0%*

App. 34-35.

There is no explicit explanation in the Record for the drastically reduced rate of whites hired in 1970-71 as compared to 1968-69. However, in 1970-71, and not in earlier years, the MPD conducted a nationwide recruiting campaign under which jobs were offered to many residents of cities far removed from the District of Columbia. App. 67-68. It is logical to assume that those recruited from geographically distant places would accept job offers in the District at a lower rate than would local residents. The decrease in the proportion of white applicants hired is thus explained by the fact that nearly half (48.8%) of all white applicants in 1970-71 were recruited nationally. App. 34. No similar drop occurred in the rate of black applicants hired because only a small proportion of black applicants (12.0%) were from the national recruitment group in these years. App. 34.

[8] Table III—Number and Percentage of Applicants, by Race, 1968-1971

Year	Total Applicants	Black Applicants	White Applicants
1968	2,556	1,695 (*66.3%*)	861 (*33.7%*)
1969	3,554	2,499 (*70.3%*)	1,055 (*29.7%*)
1970	8,026	4,178 (*52.1%*)	3,848 (*47.9%*)
1971	4,463	2,482 (*55.6%*)	1,981 (*44.4%*)
Totals:	18,599	10,854 (*58.4%*)	7,745 (*41.6%*)

App. 34.

and the racial proportions of the persons hired.[9]

The affidavit of James M. Murray, MPD Administrative Services Officer, filed in support of the defendants' Motion for Summary Judgment, claimed that beginning in August, 1969, when a new police chief was appointed, and on an increased scale in January, 1970, when the authorized strength of the Department was substantially enlarged, an affirmative recruitment effort was undertaken "directed towards increasing the number of blacks in the department." App. 66, see App. 66-69. In its decision, the district court relied on this representation, and stated that "the relatively higher percentage of black test failures must be appraised by taking into account this all-out effort to generate applications from blacks which may well have encouraged applicants with educational deficiencies to apply." CA. 50. But the claim of affirmative action is directly contradicted by the facts of Record which show that between 1969 and 1971 the proportion of applicants who were black *declined* substantially, from 70.3% in 1969 to 52.2% in 1970 and 55.6% in 1971.[10] Most of the

[9] Table IV—Number and Percentage of Hires, by Race, 1968-1971

Year	Total Hires	Black Hires	White Hires
1968	802	300 (*37.4%*)	502 (*62.6%*)
1969	1,091	495 (*45.4%*)	596 (*54.6%*)
1970	1,782	767 (*43.0%*)	1,015 (*57.0%*)
1971	771	328 (*42.5%*)	443 (*57.5%*)
Totals:	4,446	1,890 (*42.5%*)	2,556 (*57.5%*)

App. 34-35.

[10] See Table III, page 5, note 8, *supra*. Between 1969 and 1970, the year of the enlargement of the force, the number of black applications increased by 67%; the number of white applications increased by 265%. Between 1969 and 1971, black applications *declined* by 0.6%; white applications *increased* by 88%. These percentages were computed from Table III, *supra*.

sharp reduction in the proportion of black applicants was the result of the Department's nationwide recruitment program, instituted by the new police chief, which produced an overwhelmingly white group of applicants.[11] But even locally, the percentage of applicants who were black decreased from 70.3% in 1969, to 68.9% in 1970, and to 62.7% in 1971.[12] Moreover, the percentage of new hires who were black also decreased from 45.4% in 1969, to 43.0% in 1970, and to 42.5% in 1971.[13] It is thus clear that the recruitment efforts of the new police administration did not inflate the rate of black applicants or the rate of black hires.[14]

[11] In the two-year period, 2,845 of the 3,667 applicants from the national recruiting effort, or 77.6%, were white. App. 34; see App. 67-68.

[12] Table V—Number and Percentage of *Local* Applicants, by Race, 1968-1971

Year	Total Local Applicants	Total Black Local Applicants	Total White Local Applicants
1968	2,556	1,695 (*66.3%*)	861 (*33.7%*)
1969	3,554	2,499 (*70.3%*)	1,055 (*29.7%*)
1970	5,093	3,508 (*68.9%*)	1,585 (*31.1%*)
1971	3,749	2,350 (*62.7%*)	1,399 (*37.3%*)
Totals:	14,952	10,052 (*67.2%*)	4,900 (*32.8%*)

App. 33.

[13] See Table IV, p. 6, n. 9, *supra*.

[14] It is true that the Record shows that the black percentage of the force grew from 17.5% to 36.5% from the end of 1965 to the end of 1970. But that change is attributable to the very low black

continued on next page

III. EVIDENCE RELATING TO TEST VALIDITY

The only evidence offered by the defendants to support the validity of Test 21 is a 1967 Study by David Futransky of the Civil Service Commission, entitled "Relation of D.C. Police Entrance Scores to Recruit School Performance and Job Performance of White and Negro Policemen." App. 99-109.

The Futransky Study involved 280 whites and 81 blacks appointed to the Force in 1963. Futransky compared the Test 21 scores of this group, by race, to their scores on recruit school tests, and to three indicia of job performance. He also studied the relationship between performance on recruit school tests and subsequent job performance. Futransky's findings can be summarized as follows:

(i) *With Respect to the Relationship of Test 21 Scores to Recruit School Test Scores:* In 1963, and up until mid-1972,[15] recruit school consisted of academically oriented subject matter courses and written tests in some of these areas. App. 72-73, 186; see App. 110-171. It was the unbroken policy of the Department that all recruits successfully completed recruit school within the specified period. When a recruit failed to achieve a passing grade of 75 on any test, he was given

representation on the force in 1965, the hiring during these five years of new policemen in numbers almost as great as the total size of the force, and the fact that the rate of hire in the late 60s and early 70s exceeded the very low rates in the early years.

[15] The 1972 changes in recruit school training are described, *infra*, at p. 13, 35-36.

additional training and permitted to retake the test until a passing grade was achieved.[16]

Futransky studied the relationship of Test 21 to the academic recruit school test scores. He placed the subjects of the study into three groups according to their grades on Test 21. He then divided the recruit school test averages for the subjects into two groups, those over and those under 85%. Since everyone passed recruit school with a minimum grade of 75%, this 85% dividing line was not a pass-fail division, but an arbitrary line selected by Futransky for his study. He found that, for both whites and blacks, persons scoring in the highest bracket on Test 21 achieved an average of over 85% on recruit school tests in somewhat greater proportions than did persons who scored in the lower brackets on Test 21.[17] On the basis of these data, Fu-

[16] App. 102. In 1963, recruit school was 12 weeks. *Id.* It was later 17 weeks, and presumably different tests were administered. App. 192. No recruit school tests were ever produced by the defendants in connection with their claim of validity.

[17] Table VI—Summary of Futransky's Findings Comparing Test 21 Scores to Recruit School Test Averages, by Race

Test 21 Score	No. in Recruit School	No. Averaging 85% and Above on School Exams	Percent Averaging 85% and Above
A. *Blacks*			
61 and above	9	7	*78%*
52-60	23	16	*70%*
40-51	39	21	*54%*
B. *Whites*			
61 and above	83	76	*92%*
52-60	86	69	*80%*
40-51	73	46	*63%*

App. 103.

transky concluded that: "Scores on Test 21 (40 and above) show a reasonably high relationship to performance in Recruit School for both the white and Negro appointees." App. 99.

(ii) *With Respect to the Relationship of Test 21 to Job Performance:* In separate tabulations, Futransky compared levels of Test 21 scores of blacks and whites to three factors indicative of job performance: (1) the latest job performance rating for the individual officer, which is determined and entered in the officer's record regularly and periodically by his immediate supervisor; (2) so-called "Negative Performance Incidents," which are comprised of below-average supervisory ratings, a resignation with prejudice, and trial board or other disciplinary actions; and (3) "Positive Performance Incidents," which are comprised of commendations or appointments to positions of responsibility. With respect to each of these factors, Futransky found "a positive but low relationship" for white officers, and no correlation or a negative correlation for black officers.[18] He concluded: "For

[18] App. 99.

Table VII—Summary of Futransky's Findings Comparing Test 21 Scores to Job Performance Ratings, by Race

Test 21 Scores	% of Whites Rated "Above Average"	% of Blacks Rated "Above Average"
61 and above	*57%*	*37%*
52-60	*52%*	
40-51	*33%*	*39%*

App. 107. Futransky's comparisons of Test 21 scores to positive and negative incidents, are set out at App. 108-09.

the Negro officers, Test 21 (40 and above) does not predict differences in on-the-job performance." App. 99.

(iii) *With Respect to the Relationship of Recruit School Test Average to Job Performance:* In comparing recruit school averages to job performance ratings, Futransky again found "a positive but low relationship" for whites and no correlation for blacks. App. 99.[19]

Futransky recognized that the correlation between Test 21 scores and recruit school tests did not mean that persons who scored below 40 on Test 21 could not successfully master the training in Recruit School. He recommended that the Department lower the passing score from 40 to 35, and expressed his opinion that doing so would not jeopardize the Department's policy of getting every recruit through recruit school. App. 100. This recommendation was never adopted. Between 1968 and 1971, 1,743 applicants scored between 35 and 39 on Test 21. Of these, 1,465 or 84.1% were black. App. 40, 42, 44, 46. If the passing score had been reduced to 35, the black pass rate on the test would have in-

[19] Table VIII—Summary of Futransky's Findings Comparing Recruit School Averages to Job Performance Ratings, by Race

Recruit School Average	% of Whites With Above Average Performance Rating	% of Blacks With Above Average Performance Rating
85% and above	*51%*	*36%*
Below 85%	*37%*	*41%*

App. 106. Futransky also compared combinations of Test 21 scores and recruit school averages to job performance ratings, but found that the combination produced no different or greater correlation than that shown by these factors separately. App. 107.

creased from 43.7% to 57.2%, while the white pass rate would have changed from 87.0% to 90.6%.[20]

In the summer of 1972, the MPD abandoned its previous academic method of training and testing recruits and adopted a "systems approach" to training based upon a survey of the abilities expected of police officers. The new program was described in the Murray affidavit, executed in July, 1972:

> Over the period of the past year and a half, we have vastly revamped our training program. We have gone out into the field and determined what

[20] These percentages are computed from the data in text and from the totals of Table I, p. 4, n. 4, *supra*.

In support of its claim of validity, the MPD also filed a two-page affidavit of Diane E. Wilson, a Personnel Research Psychologist at the Civil Service Commission (where Test 21 was developed). App. 185-186. Ms. Wilson stated that she was familiar with both Test 21 and with the training materials that were used in the MPD Recruit School and that in her opinion "the level of verbal ability measured by Test 21 is, at most, no higher than that required for successful completion of recruit school training as determined by the final grade average attained by the recruit." App. 185. In stating this conclusion, she did not mention any passing score on Test 21.

In addition to the Futransky study and the Wilson affidavit, the defendants also submitted five other affidavits in support of their case, three of which were executed by employees of the Civil Service Commission. These affidavits are not based on any independent analysis of the relationship of Test 21 either to the training program or to the job performance of police officers. They merely argue that the Futransky study establishes the validity of Test 21. All five experts based their views solely on a review of the Futransky study, Test 21, and of each other's affidavits. See Maslow affidavit at App. 187-188 (opinion based on Futransky study); Nolan affidavit at App. 201-202 (relied only on Test 21, Futransky study and Maslow affidavit); Owens affidavit at App. 205-206 (relied only on Test 21, Futransky study and Maslow affidavit); Schwartz affidavit at App. 179 (relied only on Futransky study, Maslow memorandum and conversations with Futransky); Tenopyr affidavit at App. 173 (relied only on Futransky study, Maslow affidavit, Schwartz affidavit and Test 21).

> necessary and desirable performance objectives the officers were expected to carry out and we are building our training program around these. . . . Within the next six months, the new program will be fully operative. Among other features of this training, it will concentrate on developing proficiency as against the traditional subject matter teaching approach. Every officer will be required to become proficient in a variety of areas prior to going into the field (this, as against passing courses in subject matter areas).

App. 72-73.

There is no evidence in the Record of any relationship between Test 21 and the training procedures that are now employed.

SUMMARY OF ARGUMENT

The data of Record unequivocally establish that Test 21 has an overwhelming racially disproportionate impact. Over the four-year period from 1968 to 1971, during which 10,854 blacks and 7,745 whites took the Test, 87.0% of the whites and only 43.7% of the blacks passed. This disparity in test performance translated into a very substantial preference for whites in rates of hire. The degree of adverse racial impact shown in this Record is among the largest in any case that has been litigated.

Under familiar principles, this showing shifts the burden to defendants to prove that the Test has a manifest relation to the employment in question. Defendants have failed dismally to meet this burden. They cannot and do not make any claim that Test 21 was designed for selecting better police officers, or even that it bears any relation to performance as a police

officer. Quite the contrary, the only direct evidence on relation to actual job performance—a study done by defendants' own expert, Futransky—indicates that there is no such relationship, at least not for blacks.

In the face of this lack of actual job relatedness, the defendants rely solely on a claim that Test 21 is justified because Futransky found a modest relationship to grades obtained in a recruit training program. Plaintiffs do not deny that a relationship between a test and performance in training can provide an adequate justification for use of a test, where the measure of training performance has real significance to the employer. But here there is no such significance. The Recruit School grades used in the study were based on performance on other written tests and thus suffered from an irrelevant test-to-test correlation. Moreover, these Recruit School grades were shown to bear no relationship to subsequent job performance. Nor do they bear any relation to passing or failing Recruit School, since every recruit passes recruit school, and a majority of those with the lowest passing scores on Test 21 rank in the highest grade category in Recruit School. Finally, whatever significance these Recruit School grades may have had in the past, the Recruit School training program has been drastically altered since the time of Futransky's study to concentrate on developing job proficiency training rather than teaching academic courses, and the old Recruit School tests, at least in their traditional form, are no longer administered. There is no evidence of any relationship between Test 21 and this new, improved training program.

On these facts, it is clear that the MPD has failed in its burden of establishing the validity of Test 21

for the selection of police recruits. In the absence of proof of validity, the utility of the Test cannot be assumed. Both the professional literature and the legal requirements first articulated by this Court in *Griggs* v. *Duke Power Co.*, and developed in an impressive array of lower court decisions, reject the notion that the use of a test can be sustained, in the face of substantial adverse impact, on the basis of speculation as to its validity.

In addition, far less discriminatory alternatives are available for the sound screening of police recruits. One such alternative—a reduction in passing score—was recommended by defendants' own expert. This would have added 1,465 black test passers (a 30.9% increase in the black pass rate)and only 278 white test passers (a 4.1% increase in the white pass rate) for the 1968-1971 period. Other even less discriminatory alternatives have been adopted by police departments in other major cities.

ARGUMENT

I. TEST 21 HAS A SUBSTANTIALLY DISPROPORTIONATE ADVERSE IMPACT ON BLACK APPLICANTS TO THE MPD.

In cases challenging an employment test as racially discriminatory, the initial burden is on the plaintiff to make out a "*prima facie* case of discriminaton—[by showing] that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.* v. *Moody,* 95 S. Ct. 2362, 2375 (1975).[21] In

[21] See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 853 (1971), *Castro* v. *Beecher,* 459 F.2d 725, 732 (1st Cir. 1972); *Chance* v. *Board of Examiners,* 458 F.2d 1167, 1176 (2d Cir. 1972); *United States* v. *Georgia Power Co.*, 474 F.2d 906, 911

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this case, the statistical data of Record unequivocally establish that Test 21 has a substantial racially disproportionate impact in the selection of applicants to the MPD. Over the four-year period of Record, 87.0% of the whites and 43.7% of the blacks passed the Test—a disparity between the pass rates of 43.3%.[22] If blacks

(5th Cir. 1973). Both with respect to the requirement of an initial showing of substantially disproportionate racial impact, and with respect to the employer's burden to establish validity, the courts have applied the same standards in interpreting title VII and constitutional non-discrimination requirements applicable to public employers. See, pp. 26-27, note 35, *infra*.

[22] See Table I, page 4, note 4, *supra*.

In expressing the differences in performance of whites and blacks on a test, the cases frequently compare, or take ratios of, pass rates or fail rates. *Compare, e.g., Chance* v. *Board of Examiners,* 458 F.2d 1167, 1171 (2d Cir. 1972) (whites passed at 1.5 times the rate of blacks) and *Commonwealth of Pennsylvania* v. *O'Neill,* 348 F. Supp. 1084, 1089-90 (E.D. Pa. 1972), *aff'd in pertinent part,* 473 F.2d 1029 (3d Cir. 1973) (ratio of pass rates 1.82 to 1), *with United States* v. *Chicago,* 385 F. Supp. 543, 549-50 (N.D. Ill. 1974) (ratio of fail rates 2 to 1), and *Johnson* v. *Goodyear Tire and Rubber Co.,* 491 F.2d 1364, 1372 (5th Cir. 1974) (ratio of fail rates 3.3 to 1). Here, the ratio of pass rates (87.0% white and 43.7% black) is two to one in favor of whites; the ratio of fail rates (13% white and 56.3% black) is four to one against blacks. Either of these is more than has been required.

Plaintiffs respectfully submit, however, that ratios of pass or fail rates are not the clearest statement of the actual degree of adverse impact. This is so because ratios drawn in this way are affected by the absolute size of the percentages involved and may vary dramatically depending on whether pass rates or fail rates are being compared, as well as by the real differences in performance. Thus, in this case the ratio of fail rates (four to one) is greater than the ratio of pass rates (two to one) merely because the fail rate percentages are smaller numbers than the pass rate percentages, even though the two ratios are merely opposite sides of the same coin.

We suggest that the adverse impact is best evidenced by the percentage point *difference* between the pass rates of the two groups (or the difference in fail rates, which is the same). See *Allen* v.

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had passed the Test at the same rates as whites, an additional 4,696 black applicants would have been successful—thereby doubling the number of black test passers in four years. Because of the large size of the disparity and the large size of the sample, the statistical significance of the differences in performance is extraordinarily great. See page 4, note 6, *supra*. The differences here exceed those which the lower federal courts have universally held sufficient to shift to the employer the burden of establishing that a test is job related.[23]

City of Mobile, 466 F.2d 122, 126 (5th Cir. 1972) (Goldberg, J., dissenting). The difference between pass (or fail) rates expresses the actual degree of adverse impact—which can be defined as the proportion of the disadvantaged group that is adversely affected by the non-neutrality of the standard. Expressing differences of performance in this way provides a scale with a range of 0 to 100 on which adverse impact can be uniformly measured. If the pass rates were 100 percent and zero, then 100 percent of the latter group would be adversely affected. If the pass rates are the same, there is no adverse impact. The disparity in this case—43.3 percent—is among the largest in any case that has been litigated. See note 23, *infra*.

[23] See *Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d 420, 425 (2d Cir. 1975) (23.2% disparity between pass rates); *Boston Chapter, NAACP, Inc.* v. *Beecher,* 504 F.2d 1017, 1019-20 n. 3 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975) (17%); *Johnson* v. *Goodyear Tire and Rubber Co.,* 491 F.2d 1364, 1372 (5th Cir. 1974) (34%); *Vulcan Society of New York City Fire Department, Inc.* v. *Civil Service Commission,* 490 F.2d 387, 392 (2d Cir. 1973) (11.8%); *Bridgeport Guardians* v. *Members of Bridgeport Civil Service Commission,* 482 F.2d 1333, 1335 (2d Cir. 1973), *cert. denied,* 421 U.S. 991 (1975) (41%); *Moody* v. *Albemarle Paper Company,* 474 F.2d 134, 138 n. 1 (4th Cir. 1973), *vacated on other grounds,* 95 S. Ct. 2362 (1975) (32%); *United States* v. *Georgia Power Company,* 474 U.S. 906, 912, n. 5 (5th Cir. 1973) (differences ranging from 29.1% to 41.7%); *Castro* v. *Beecher,* 459 F.2d 725, 729 (1st Cir. 1972)

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In contending that, despite these extreme differences in performance, Test 21 does not have a substantial adverse racial impact, defendants make three arguments. None has any merit.

First, the defendants argue that "disproportionate racial impact . . . must be traceable to *selection practices* considered as a whole, rather than to test results considered in isolation." Pet. Bf., p. 12 (emphasis in original). In other words, the defendants' position is that if black and white applicants were actually hired at substantially equivalent rates due to some compensatory procedure, the lesser performance of blacks on Test 21 would not be sufficient to require the defendants to demonstrate the validity of the test. See *Smith* v. *City of East Cleveland,* 520 F.2d 492, 498 (6th Cir. 1975).

It is unnecessary to decide the validity of this general proposition, because it plainly has no applicability to the facts of this case. In the four-year period included in the Record, 33.0% of the white applicants

(40%); *Jones* v. *New York Human Resources Administration,* 391 F. Supp. 1064, 1068-69 (S.D. N.Y. 1975) (differences ranging from 21% to 69%); *Arnold* v. *Ballard,* 390 F. Supp. 723, 730 (N.D. Ohio 1975) (37%); *United States* v. *Chicago,* 385 F. Supp. 543, 549-50 (N.D. Ill. 1974) (34%); *Commonwealth of Pennsylvania* v. *Glickman,* 370 F. Supp. 724, 730 (W.D. Pa. 1974) (24.8%); *Officers for Justice* v. *Civil Service Commission of San Francisco,* 371 F. Supp. 1328, 1332, 33 (N.D. Cal. 1973) (44.2% difference on employment exam, 13% difference on promotion exam); *Harper* v. *Mayor and City Council of Baltimore,* 359 F. Supp. 1187, 1198 (D. Md. 1973), *aff'd in relevant part sub nom. Harper* v. *Kloster,* 486 F.2d 1134 (4th Cir. 1974) (16.5%); *Shield Club* v. *City of Cleveland,* 370 F. Supp. 251, 253 (N.D. Ohio 1972) (21.8%); *Western Addition Community Organization* v. *Alioto,* 330 F. Supp. 536, 538 (N.D. Cal. 1971) (24%).

and only 17.4% of the black applicants were hired[24] —a disparity which closely reflects the whites' 2 to 1 advantage in passing the test.

Notwithstanding these clear facts, defendants argue that there is no substantial adverse impact on blacks in the overall hiring process, because in 1970 and 1971 blacks constituted 53% of the applicants and 43% of the persons hired. Pet. Bf., pp. 9, 13, 14. This underrepresentation of blacks among the persons hired is itself substantial. Moreover, these percentages are based on selective and incomplete data which understate the actual disparity. The Record contains statistical data for four years, not merely the two years chosen by defendants. During this entire period, blacks constituted 58.4% of the applicants and 42.5% of the persons hired. See Tables III and IV, pp. 5-6, n. 8, 9, *supra.*[25] If blacks had been hired in proportion to their representation in the applicant pool, 37% more blacks (706 persons) would have been hired.[26] It is evident that the MPD's "selection practices consid-

[24] See Table II, page 5, note 7, *supra.*

[25] Defendants offer no reason for examining only the 1970 and 1971 figures, and indeed in those years the percentage of black applicants was artificially lowered by the defendants' nationwide recruitment campaign which primarily attracted whites. See p. 7, *supra.* This suit was filed in 1970. If part of the Record is more relevant for purposes of determining liability than another, it is data for 1968 and 1969, the years preceding suit. See *Rice* v. *Gates Rubber Co.,* 11 F.E.P. cases 986-88 (6th Cir. August 25, 1975); *Parham* v. *Southwestern Bell Tele.,* 433 F.2d 421, 425 (8th Cir. 1970). For those two years, the black percentage of the applicants was 68.6%; the black percentage of the hires was 42.0%. Blacks continued to constitute more than 60% of *local* applicants in 1970 and 1971. See Table V, p. 7, n. 12, *supra.*

[26] A total of 4446 persons were hired. Table IV, p. 6, n. 9. If 58.4% of these hires had been black, 2596 blacks, rather than 1890, would have been hired, an increase of 37.3%.

ered as a whole" do have substantial adverse impact on black applicants.

Second, the defendants argue that "a favorable comparison between the racial composition of the employer's work force and the percentage of minority group members in the surrounding area is sufficient to negate a disproportionate racial impact." Pet. Bf., p. 15. This proposition is wrong as a matter of precedent and wrong as a matter of principle. Moreover, the racial composition of the MPD does *not* compare favorably with the racial composition of the relevant labor pool.

In *Albemarle Paper Co.* v. *Moody, supra* (1975), this Court spoke of establishing a "*prima facie* case of discrimination" on the basis of a test's impact on "applicants for hire or promotion", 95 S. Ct. at 2375. See also *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802, n. 14 (1973); *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430 (1971). The defendants have not cited a single decision anywhere in which a court declined to find a *prima facie* case when a test had a substantial adverse impact on blacks in the pool of persons actually applying for employment.[27] Moreover, in several

[27] The cases cited by defendants, Pet. Bf. p. 15, are all inapposite. In *Jones* v. *Tri-County Electric Cooperative, Inc.,* 512 F.2d 1 (5th Cir. 1975) an employer with a history of near total exclusion of blacks from employment, and consequently a very low number of black applicants, attempted to avoid a finding of *prima facie* discrimination because he had hired a larger percentage of black than white applicants. Because the employer's history of discrimination distorted the applicant flow, the Court relied on the disparity between the high proportion of blacks in the immediate population and low proportion of blacks in the employer's work force to *find* a *prima facie* case of discrimination in hiring. "[T]his is an instance . . . in which percentage

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cases, adverse effect was found on the basis of the test's disproportionate racial impact on the pool of applicants, even though the work force included a higher proportion of minority group members than did the local population.[28]

Not only is the defendants' position contrary to all precedent, it badly misconceives the central thrust of fair employment laws. These laws neither guarantee nor limit any racial group to a quota percentage of employment. 42 U.S.C. § 2000e-2(j). What the law re-

statistics standing alone, fail to convey the full picture." 512 F.2d at 2.

Arnold v. *Ballard,* 390 F. Supp. 723 (N.D. Ohio 1975), involved a challenge to two different tests administered to applicants by the Akron, Ohio police department. The test that was in effect when the suit was filed was found by the court to be presumptively discriminatory on the basis of data showing that whites passed the test in far higher proportions than blacks. Population data were not considered. 390 F. Supp. at 730. During the litigation, the defendants carefully developed a new test designed specifically for the selection of police applicants by the City of Akron. The court found that there were no statistically significant differences in the scores of whites and blacks on this test, and that it had been proven valid for the purpose for which it was administered. *Id.* at 733. To *corroborate* its finding of no adverse impact, the court observed that blacks constituted a larger proportion of test passers than the black percentage of the Akron population. *Id.*

Robinson v. *Union Carbide Corp.,* 380 F. Supp. 731 (S.D. Ala. 1974), appeal pending, No. 75-1008 (5th Cir.), is a case plainly influenced by very special factors. See 380 F. Supp. at 732-37. Whether the decision on its facts is correct or not, it suffices to say that no test or any other objective selection standard was involved in that litigation.

[28] *Green* v. *Missouri Pacific Railroad Company,* 10 EPD ¶ 10,314 (8th Cir. 1975), *rehearing denied,* 10 EPD ¶ 10,384 (8th Cir. 1975); *Johnson* v. *Goodyear Tire and Rubber Co.,* 491 F.2d 1364 (5th Cir. 1974); *Jones* v. *New York Human Resources Administration,* 391 F. Supp. 1064 (S.D.N.Y. 1975). *Cf. Hester* v. *Southern Railway Company,* 497 F.2d 1374 (5th Cir. 1974).

quires is that each applicant be treated fairly without regard to race, and, specifically, be judged by selection criteria that are either racially neutral or job related. *Western Addition Community Organization* v. *Alioto,* 360 F. Supp. 733, 739 (N.D. Cal. 1973). If a black applicant is disqualified because he fails a test which has a racially disproportionate impact on blacks, the burden is imposed on the employer to prove that the test is job related. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited," *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431 (1971), wholly apart from the relation of the percentage of blacks in the employer's work force to that in the population.

Another consideration which undermines defendants' argument is the facts in this Record. According to the 1970 Census, blacks comprised 65.1% of the males in the District of Columbia between the ages of 20 and 30—the age group from which new officers are recruited. App. 72. The latest figures in the Record showing the racial composition of officers of the MPD are for December 1970, and these show that 36.5% of the officers were black. App. 192. This comparison is obviously not helpful to the defendants.

Undaunted, the defendants ask the Court to consider the lesser proportion of blacks residing within 50 miles of the city,[29] because, it is claimed, this area is the Department's "primary recruitment area." Pet. Bf., p. 14. The only Record support for this claim is an

[29] Defendants have not proved the racial proportions in this area, but plaintiffs do not dispute that the percentage of blacks within 50 miles of the District is below 36.5%.

assertion to that effect, without any supporting facts or explanation, contained in the Murray affidavit. App. 72. Certainly the statistical showing in this Record of adverse impact on the actual pool of applicants, in a city with almost twice the percentage of blacks in the population as in the MPD, cannot be rebutted by an offhand assertion that some area with a lesser percentage of blacks is MPD's "primary recruitment area."

Moreover, even had defendants established that a circle with a 50-mile radius around Washington is its recruitment area in some meaningful sense, it does not follow that the population of this area could be treated monolithically in determining the black percentage of the available labor pool. Certainly, the population figures would have to be weighted to accord greater significance to the population of the District of Columbia than to that of Baltimore, or of some outlying rural area on the Eastern Shore, so as to account for the differences in interest in, and availability for, employment in the District. See *Harper* v. *Mayor of Baltimore,* 359 F. Supp. 1187, 1193 (D. Md. 1973), *aff'd in relevant part, sub nom., Harper* v. *Kloster,* 486 F.2d 1134 (4th Cir. 1974). In addition, some analysis would be necessary to eliminate persons who are not potential police recruits because they work in, or expect to find, better paying jobs. *Castro* v. *Beecher,* 334 F. Supp. 930, 936 (D. Mass. 1971); *Harper* v. *Mayor of Baltimore, supra,* 359 F. Supp. at 1193, n. 5. Indeed, if the process of refinement of the raw population figures to take account of availability and of interest were carried to conclusion, and absent any special factors producing distortions, the relevant labor pool would presumably approximate the applicant pool—which is, of course,

the best reflection of the persons interested in the particular employment. Since that is so, the initial reference to the labor pool, rather than the applicant pool, is circular.

This presumption that the applicant pool is the best evidence of the actual labor pool is, of course, subject to rebuttal in any case where it can be shown that some distorting factor is operative. Here, defendants suggest that a recruitment program instituted when Chief Wilson took office in late 1969 inflated the black applicant pool. Pet. Bf., p. 3. That suggestion is false, however, as the data clearly show. The fact is the recruitment efforts in 1970 and 1971 reduced the rate of black applications both nationally and locally. See pp. ——, *supra.*[30]

Third, defendants argue that Test 21 does not have adverse racial impact because the percentage of blacks on the force increased from 17.5% in 1965 to 36.5% in

[30] The district court accepted defendants' argument that the proportion of black applicants was enlarged by special recruitment efforts, despite the hard facts to the contrary. CA. 50. Division 14 of the American Psychological Association, *amicus curiae,* relies on this error in suggesting that the case be remanded to determine "the extent to which—if any—the Department's affirmative recruiting practices produced an atypical black sample, less of whom were qualified for police officer training than their white peers, and the degree to which any such sample abnormality accounts for the susbtantially adverse test performance of blacks tested." Div. 14 Bf., p. 31, n. 63. Not only does the Record make clear that the Department's recruitment efforts in 1970 and 1971 reduced the proportion of black applicants, but comparative white and black test performance on Test 21 was virtually identical in each year from 1968 to 1971, see Table I, p. 4, n. 4, *supra,* so there is no possibility that the relative performance rates were influenced by the recruitment effort to which Division 14 refers.

1971, while the Test 21 requirement has not changed.[31] But since the Test requirement has not changed, the increase in black representation on the MPD is obviously attributable to other factors. Several such factors having nothing to do with Test 21 are suggested in the Record, including the sharp increase in black population in the District during the years in question,[32] the low percentage of blacks on the force in the past,[33] and most important, the fact that the size of the police force almost doubled between 1967 and 1970, during which time blacks were hired at a rate exceeding their previous level of representation.[34] As the Court of Appeals observed, "it is self-evident that the use of selection procedures that did not have a disparate effect on blacks would have resulted in an even greater percentage of black officers than exists today." C.A. 9.

In sum, none of defendants' arguments in any way lessens the clear showing of the disparate racial impact

[31] In connection with this argument, the defendants have also argued that under *Griggs* a test is unlawful only where it operates to "freeze the status quo of prior discrimination." Pet. Bf., pp. 15-16. This was not an accurate categorization of the *Griggs* decision, where the Court unanimously held that "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. 424, 431 (1971). If *Griggs* left any question as to whether proof of prior exclusion is a necessary element, the question was plainly answered in the negative by this Court's decision in *Albemarle Paper Co.* v. *Moody,* 95 S. Ct. 2362 (1975).

[32] The population of black males in the District of Columbia between the ages of 20-29 increased by 54% between 1960 and 1970. The population of white males in that age bracket decreased by 19%. U.S. Department of Commerce, Bureau of the Census, General Population Characteristics, District of Columbia, PC(1)-B10 (1971).

[33] App. 192; Table IV, p. 6, n. 9, *supra.*. *See also Castro* v. 334 F. Supp. 930, 936 (D. Mass. 1971).

[34] App. 192.

of Test 21 and its consequent adverse impact on blacks in hiring.

II. DEFENDANTS HAVE FAILED IN THEIR BURDEN OF JUSTIFYING THE USE OF TEST 21

When the racially disproportionate impact of a test is thus established, the burden falls to the employer to prove that the test requirement "has a manifest relation to the employment in question." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971); *see Albemarle Paper Co.* v. *Moody*, 95 S.Ct. 2362, 2376 (1975). *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1176 (2d Cir. 1973).[35] The primary issue before the Court is whether the defendants have sustained that burden.

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[35] This case was filed before title VII was amended in 1972 to extend its coverage to public employers, including the federal government, Equal Employment Opportunity Act of 1972, 86 Stat. 211, 42 U.S.C. § 2000e-16 (Supp. II 1972). However, the case was decided in the district court after the amendment, and both of the courts below, as well as the parties, have treated title VII standards as applicable to the decision of this action. *See* CA. 2, n. 2; CA. 48; Pet. Bf., p. 16-17. This is in accord with settled principles concerning the applicability of federal statutory amendments to pending litigation. *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696 (1974); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) (Marshall, C. J.); *Womack* v. *Lynn*, 504 F.2d 267 (D.C. Cir. 1974); *Koger* v. *Ball*, 497 F.2d 702 (4th Cir. 1974); *but see Place* v. *Weinberger*, 497 F.2d 412 (6th Cir. 1974).

Moreover, in a long series of cases challenging testing practices of public employers under a constitutional equal protection standard, the courts have specifically equated title VII and constitutional requirements.

> [I]t would be anomalous at best if a public employer could stand back and require racial minorities to prove that its employment tests were inadequate at a time when this nation is demanding that private employers in the same situation come forward and affirmatively demonstrate the validity of such tests. . . . The anomaly would only be emphasized by the

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A. *Defendants Have Not Shown That Test 21 is Related to Any Relevant Criterion of Performance*

In deciding this issue, it is important to underscore the very limited nature of what defendants do claim. The MPD does not assert that Test 21 was designed for use in selecting policemen. In fact, it is a verbal test used throughout the federal service for a wide variety of jobs "where no higher ability is required than is represented by High School graduation." App. 101. Moreover, the defendants do not claim that Test 21 was adopted on the basis of any analysis of the require-

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> recent passage of [the 1972 Amendments to title VII], which broadened Title VII to include state and city public employers.

Chance v. *Board of Examiners*, 458 F.2d 1167, 1176-77 (2nd Cir. 1972). *Accord, Castro* v. *Beecher*, 459 F.2d 725, 732-33 (1st Cir. 1972) (Boston Police); *Bridgeport Guardians* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333, 1337 (2d Cir. 1973) (Bridgeport Police); *Harper* v. *Mayor of Baltimore*, 359 F. Supp. 1187, 1200 (D. Md.), *aff'd in pertinent part*, 486 F.2d 1134 (4th Cir. 1973) (Baltimore Firemen); *Wade* v. *Mississippi Cooperative Extension Service*, 372 F. Supp. 126, 143 (N.D. Miss. 1974) (MCES workers); *Arnold* v. *Ballard*, 390 F. Supp. 723, 736, 737 (N.D. Ohio 1975) (Akron Police); *United States* v. *Chicago*, 385 F. Supp. 543, 553 (N.D. Ill. 1974) (Chicago Police); *Fowler* v. *Schwarzwalder*, 351 F. Supp. 721, 724 (D. Minn. 1972) (St. Paul Firemen); *Douglas* v. *Hampton*, 512 F.2d 976, 981 (D.C. Cir. 1975) (Federal Civil Service). *Cf. McDonnell Douglas Corp.* v. *Green*, 441 U.S. 792, 802 n. 14 (1973); *but cf. Tyler* v. *Vickery*, 517 F.2d 1089, 1096 (5th Cir. 1975) *application for extension of time to file petition for cert. granted*, No. A-542 (December 16, 1975).

In adopting this constitutional standard, the courts have generally declined to engage "in an agonizing semantic discussion as to whether it is within or without the parameters of the 'rational basis' test used in distinguishable situations." *Bridgeport Guardians* v. *Bridgeport Civil Service Commission, supra*, 482 F.2d at 1337. *See also Chance* v. *Board of Examiners, supra*, 458 F.2d at 1177; *Castro* v. *Beecher, supra*, 459 F.2d at 732; *United States* v. *Chicago, supra*, 385 F. Supp. at 554 n. 7.

ments of a policemen's job, but simply on the assumption that it would indicate verbal skills necessary for success in recruit school.[36]

Nor do the defendants claim that Test 21 has been validated with respect to performance as a policeman or even that it bears any relationship to such performance. Quite the contrary, their own expert, Futransky, studied the relationship of Test 21 to three distinct measures of job performance and found that there was none. He put this conclusion squarely: "For Negro officers, Test 21 (40 and above) does not predict differences in on-the-job performance." App. 99.[37] This finding of a lack of direct correlation with job performance, together with the generalized nature of the test, and its selection without a careful job analysis, constitute the context in which the defendants' claim of validity must be judged.

The defendants' only argument in attempting to satisfy their burden of proving test validity is that test scores are related to the old recruit school grades. They

[36] Where a test is not designed for the purpose for which it is used, the courts have drawn inferences against the likelihood of its validity. See *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387, 395-96 (2d Cir. 1973); *Boston NAACP* v. *Beecher*, 504 F.2d 1017, 1022-23 (1st Cir. 1974); *Bridgeport Guardians* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333, 1338 (2d Cir. 1973).

[37] Several of the other expert affidavits submitted by defendants attempt to disclaim the findings of Futransky that Test 21 is unrelated to police performance, even though these same affidavits place great reliance on Futransky's other findings regarding the relationship of Test 21 to old recruit school grades. App. 173-74; 179-80; 188; 201-2; 205-6. But whether or not the MPD can disclaim one portion of Futransky's study and rely on another, it suffices to say that no expert affidavit submitted by defendants affirmatively claims that Test 21 *is* related to job performance.

rely heavily on that portion of the Futransky study showing such a correlation and on the related expert affidavits [38] to assert that Test 21 is a valid measure of "trainability."

This assertion goes to the heart of the case. Under what circumstances can a showing that a highly discriminatory test is related to performance in training, rather than to actual job performance, adequately justify its use? Plaintiffs recognize that in appropriate circumstances a test can be upheld on the basis of its relationship to training. Even though the basic inquiry demanded by *Griggs* and *Moody* concerns *job* relatedness, training relatedness may be a proper basis for validation where the measure of training performance has relevance to significant interests of the employer.

This is undoubtedly the case, for example, where a measure of training performance is demonstrably related to job performance. In that event, the correlation with training performance is an indirect correla-

[38] As noted earlier, five out of six of defendants' expert affidavits are derived from the Futransky study. The sixth affidavit, by Diane E. Wilson, purports to be based on an independent examination of the Test 21-Recruit School relationship. However, this affidavit is only two pages long and it is nothing more than an unsupported conclusion.

Surely the Wilson affidavit does not constitute the kind of expert study which could establish "rational validity" for Test 21 within the meaning of Civil Service Commission guidelines, 37 Fed. Reg. 21552-58 (1972) or the similar concept of content validity within the meaning of EEOC guidelines on testing. 29 C.F.R. § 1607. It is devoid of the careful study and comparison which both sets of guidelines and all courts have required. *See, e.g., Boston NAACP* v. *Beecher*, 504 F.2d 1017, 1024 (1st Cir. 1974); *Chance* v. *Board of Examiners*, 330 F. Supp. 203, 218-20 (S.D. N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972); *Moody* v. *Albemarle Paper Co.*, 474 F.2d 134, 138 (4th Cir. 1973), *vacated on other grounds*, 95 S. Ct. 2362 (1975). It is entitled to scant attention by the Court.

tion with job performance. Differences in training performance that relate to substantial differences in the length or cost of training,[39] or to the ability of the individual to complete a fair and nondiscriminatory training program,[40] may also be significant to the interests of the employer. On the other hand, where the measure of training performance bears no demonstrable relationship to employer needs, it cannot, consistent with *Griggs* and *Moody,* serve as a criterion for the validation of the test.

In this case, the correlation with training performance relied upon by the defendants has absolutely no operative significance. It provides no basis for continuing to use Test 21.

First, the measure of training performance relied upon by defendants is simply grades on other paper-and-pencil tests. There is a natural and inherent correlation between grades on one written test, such as Test 21, and grades on another written test. This inherent correlation has nothing to do with job relatedness (unless the job happens to be taking written tests) or anything else of real significance. This obvious truth has not escaped the lower courts. With the lone exception of the district court in this case, every court that has passed on the question has rejected the argument that an applicant test can be shown valid on the basis of a correlation with passing scores in training school tests. *See Vulcan Society* v. *Civil Service Commission, supra,* 490 F.2d at 396 n.11; *United States* v.

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[39] EEOC Guidelines on Employment Selection Procedures, 29 C.F.R. § 1607.5(b)(3).

[40] *Spurlock* v. *United Airlines, Inc.,* 330 F. Supp. 228 (D. Colo. 1971).

Chicago, supra, 385 F.Supp. at 556; *Officers for Justice* v. *Civil Service Commission,* 371 F.Supp. 1328, 1337 (N.D. Cal. 1973); *Smith* v. *East Cleveland,* 363 F.Supp. 1131, 1148-49 (N.D. Ohio 1973), *rev'd on other grounds,* 520 F.2d 492 (6th Cir. 1975); *Harper* v. *Mayor of Baltimore, supra,* 359 F.Supp. at 1202-03; *Commonwealth of Pennsylvania* v. *O'Neill, supra,* 348 F.Supp. at 1090-91. *Compare Boston NAACP* v. *Beecher, supra,* 504 F.2d at 1023. The basis for the uniform rejection of training school grades as an appropriate criterion for validation was explained by Judge Friendly in his opinion for the Court of Appeals in *Vulcan Society:*

> [T]here is a distinct possibility that a claim that the qualifying examination tests for ability to learn in the probationary school is in fact no more than a claim that performance on the written qualifying examination predicts with reasonable accuracy performance on the written probationary examination. Without evidence that the second examination is job related, such a demonstration is barren indeed.

490 F.2d at 396, n. 11. Or, in the words of Judge Robinson in the court below: "We think this evidence [of the correlation between Test 21 and old recruit school grades] tends to prove nothing more than that a written aptitude test will accurately predict performance on a second round of written examinations, and nothing to counter this hypothesis has been presented to us." CA. 12. At the very least such a test-to-test correlation must be viewed as highly suspect.

Second, even with the inherent advantage of test-to-test correlation, Test 21's power to select persons who would obtain high grades under the old training system was, at best, marginal. A majority of both the

blacks and the whites who achieved the lowest passing scores on Test 21 were in the *highest* grade category in recruit school. See Table VI, p. 9, n. 17, *supra*.[41]

Third, even to the extent that Test 21 was of some value in predicting old Recruit School grades above and below 85, there is no claim that such grades were ever predictive in any way of subsequent job performance by blacks. Indeed, Futransky studied this question, in attempting to correlate Recruit School test levels with job performance ratings, and found that no significant correlation existed. See Table VIII, p. 11, n. 19, *supra.*

Fourth, recruit school grades either over or under 85% have not been used by the Department for any purpose. No one failed Recruit School. Recruit School tests were more in the nature of written exercises to determine whether a recruit had completed certain subject matter than examinations intended to distinguish various levels of achievement. If a recruit scored below 75 on a test, he simply studied the material some more, and took the test again. As the court of appeals stated: "Recruit school averages have not been used

[41] Reference to the coefficients of correlation found by Futransky confirms the minor nature of the relationship. Futransky found a correlation between Test 21 scores and recruit school test averages of .46 for Whites and .39 for Blacks. These correlations are statistically significant, in the sense that they show more of a relationship than is likely to have occurred by chance, but are nevertheless rather low in terms of their practical consequences. A standard textbook describes a level of correlation of .40 between two tests as indicating "a moderate degree of positive relationship," or as indicating that "there is some tendency for those . . . doing well [on one test] also to perform well [on the other test] and vice versa, although the relationship is not close." A. ANASTASI, PSYCHOLOGICAL TESTING 76 (3d Ed. 1968).

by the Department for any purpose other than the attempt to validate Test 21 in this case." CA. 14.

Despite all these factors, the defendants argue that the use of Test 21 is valuable because it aids the MPD in screening out persons who would be unable to complete Recruit School. This claim, however, is not supported by the facts of this case or any reasonable inference which can be drawn from them. The basic defect in defendants' argument is that no one scoring less than 40 on Test 21 has ever been given a chance to demonstrate his ability in Recruit School,[42] and no one who has been given a chance has ever failed in the school. Indeed, Futransky's finding that a majority of recruits

[42] An argument similar to that of defendants here was raised in *Boston NAACP* v. *Beecher, supra,* and rejected by the Court:

> The data which the study did produce is said to reveal that fire fighters who passed and got high scores were superior in a few ways to fire fighters who passed with lower scores. We are then asked to infer that applicants who fail the test would have performed the same tasks more poorly still. The inference is a difficult one to draw. A very high passing score might indicate a special motivation or knowledge. On the other hand, the differences reflected by test scores in the range of 50 to 80 might be altogether negligible. We cannot tell. But a correlation within the range of 70 to 100 can easily be produced by data that would indicate no significance in differences in the 50 to 70 range.

504 F.2d at 1025. *Cf. U.S.* v. *Georgia Power Co.*, 474 F.2d 906, 914 (5th Cir. 1973).

The defendants here do not merely ask the Court to indulge the type of assumption rejected by the First Circuit in *Boston NAACP* —which here would be the assumption that persons scoring below 40 on Test 21 would achieve a Recruit School average over 85% in lesser proportions than do persons who score above 40 on Test 21—but go one novel step further. They ask the Court to infer that these persons would *fail* Recruit School, when there have been no failures, and thus there is no pattern that could be assumed to extend to persons who score below 40.

who scored in the lowest passing bracket on Test 21 scored in the highest passing bracket in Recruit School supports the inference that many of the persons who failed to achieve a 40 on Test 21, not only would have passed Recruit School, but would have done so in the highest bracket. It is simply illogical to assume that Futransky's correlation means that persons scoring under 40 on Test 21 would have failed in Recruit School.

A simple hypothetical will demonstrate the illogic of defendants' assertion. If the MPD had imposed a cutoff score of 45 on Test 21 in its hiring, and Futransky had studied the relationship between the level of passing scores on Test 21 and Recruit School averages, he would have reported the same sort of correlations as he did in his actual study. In that event, the MPD would have exactly the same basis it has now, no more nor less, for arguing that its Test 21 requirement (with a cutoff of 45) avoids Recruit School failures. But because persons who scored 40 were actually accepted and never failed, we know in the hypothetical that a passing score of 45 would have been unnecessarily high.

Futransky understood this point better than do the defendants. He expressly recommended that the cutoff score be reduced from 40 to 35, specifically because the additional test passers *would* be able to complete recruit school. App. 100. But he had no better basis for assuming that 35 would be an appropriate cutoff score than does the MPD with its 40. There may be "some score [on the test] that would reflect substantially deficient motivation or ability to understand or communicate . . . [but] we do not know where that point may be." *Boston NAACP* v. *Beecher, supra,* 504 F.2d

at 1025.[43] Since the Recruit School program was keyed to the high school graduate level, App. 100-101; 186, and all recruits must be high school graduates, CA. 48, it may well be that *all* otherwise qualified applicants could have succeeded in the old training program.

There is still another reason why defendants' claim of validity must be rejected. Futransky's study was conducted in 1967. In 1972 the entire Recruit School program was "vastly revamped" to

> concentrate on developing proficiency as against the traditional subject matter teaching approach.

Murray Affidavit, App. 73, see p. 13, *supra*. In this new training program

> Every officer [is] required to become proficient in a variety of areas prior to going into the field *(this, as against passing courses in subject matter areas)*.

Id. (Emphasis added.)[44] Thus, the new training program discards the paper and pencil approach to meas-

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[43] In *United States* v. *North Carolina*, 10 E.P.D. ¶ 10,438 (E.D. N.C. 1975), a three-judge district court enjoined the use of the National Teachers Examination with a cutoff score of 950, not because the court doubted "that the NTE tests measure the critical mass of knowledge in academic subject matter and that a score somewhere on the scale would disclose the knowledge necessary as a prerequisite to effective teaching," but because "where that point is—whether at 950 or some other score—is not established by the Record." 10 EPD at p. 5920.

[44] While this new training program was described prospectively in the Murray affidavit in 1972, it has since become a reality. The new training program has more recently been described by the MPD as "a bold and far-reaching endeavor." Subgrantee Progress Report, submitted by MPD to Office of Criminal Justice Planning, July 11, 1973.

uring success and destroys any possible relevance of Futransky's finding of a correlation between Test 21 and the discarded Recruit School tests. There is no data or evidence of any kind whatsoever indicating a continuing relationship between Test 21 and the current recruit training program. Indeed, the Murray Affidavit states:

> there has been no opportunity to correlate [the new training program] with Test 21. Until such time as the Civil Service Commission attempts to correlate their Test 21 as against our new training program I have no opinion as to the validity of the test.

App. 73.

B. *The Use of Test 21 Cannot Be Upheld on the Basis of Speculation That It Improves the Overall Caliber of Police Recruits.*

Plaintiffs have argued that the Futransky study fails to establish that Test 21 has a relationship to any substantial concern of the MPD. But Judge Robb, dissenting in the court of appeals, seemed to find that the Test was valid quite apart from the worth of the Futransky study:

> In my judgment Test No. 21 on its face is a fair and reasonable test of the ability of a police recruit to measure up to the qualifications I have outlined. In other words, I think it is "job related" on its face.

CA. 20. See also CA. 52 (opinion of the district court). As Judge Robb described it, his view is based on the "common sense theory" that someone scoring below 40 on Test 21 could not "qualify for admission to the Police Academy and thereafter for membership in the Police Department." CA. 20.

The trouble with this "common sense theory" is that it is unsupported speculation. It is essentially no different than the claim made by the company vice president in *Griggs* v. *Duke Power Co.*, that in "the Company's judgment" the test requirement there "generally would improve the overall quality of the work force" 401 U.S. at 431. But, recognizing "the inadequacy of broad and general testing devices," 401 U.S. at 433, this Court in *Griggs* demanded proof of validity:

> What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

401 U.S. at 436.[45]

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[45] The legislative history of the 1972 Amendments to Title VII makes explicitly clear the intention of Congress that the standards articulated by this Court in *Griggs* be applied to tests, such as Test 21, developed by the United States Civil Service Commission. The Report of the House Committee on Education and Labor stated:

> Civil Service selection and promotion requirements are replete with artificial selection and promotion requirements that place a premium on "paper" credentials which frequently prove of questionable value as a means of predicting actual job performance. The problem is further aggravated by the agency's use of general ability tests which are not aimed at any direct relationship to specific jobs. The inevitable consequence of this, as demonstrated by similar practices in the private sector, and, found unlawful by the Supreme Court, is that classes of persons who are culturally or educationally disadvantaged are subjected to a heavier burden in seeking employment.

Report No. 92-238 (92nd. Cong., 1st Sess., 1971) at 24. Echoing this concern, the Report of the Senate Committee on Labor and Public Welfare stated:

> . . . [T]he Committee expects the Civil Service Commission to undertake a thorough reexamination of its entire testing and qualification program to ensure that the standards enunciated in the *Griggs* case are fully met.

Report No. 92-415 (92nd Cong., 1st Sess., 1971) at 15.

The *Griggs* decision is wholly in accord with the basic teaching of industrial psychology that the usefulness of a test for a given purpose cannot be appraised without a careful and competent validation study, which measures the statistical relationship between the test and some criterion of performance (criterion related validation),[46] or which, through rigorous analysis, seeks to determine the relationship between the content of the test and the content of the job.[47] See, *e.g.*, A. ANASTASI, PSYCHOLOGICAL TESTING, 100-114 (3d ed. 1968); L. CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING, 126-149 (3d ed. 1970); DIV. IND'L PSYCH., APA PRINCIPLES FOR THE VALIDATION AND USE OF PERSONNEL SELECTION PROCEDURES (1975). All authorities reject the idea that validity can be determined by just reading the test:

> Content validity should not be confused with face validity. The latter is not validity in the technical sense; it refers, not to what the test actually measures, but to what it appears superficially to measure. Face validity pertains to whether the test "looks valid" to the subjects who take it, the administrative personnel who decide on its use, and *other technically untrained observers.*
>
> . . . [F]ace validity should never be regarded as a substitute for objectively determined validity. A. ANASTASI, PRINCIPLES OF PSYCHOLOGICAL TESTING 104 (3d ed. 1968) (emphasis added).[48]

Apart from the fallacy of the whole concept, plaintiffs note that Test 21 cannot even be said to have "face validity." A large number of the Test's questions include definitions of words which are unlikely to be used in police work,[49] or require verbal nuances which can-

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[46] See *Bridgeport Guardians* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333, 1337 (2d Cir. 1973).

[47] The requirements of a content validation study have been described as follows:

> For a test to be content valid, the aptitudes and skills required for successful examination performance must be those aptitudes and skills required for successful job performance. It is essential that the examination test these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job.
>
> There is no dispute between the parties that a thorough knowledge of the job to be tested is necessary in order to construct a content valid examination. Without this knowledge it is impossible to determine whether the content of the examination is sufficiently related to the content of the job to justify its use. The means used to acquire this information is known professionally as a job analysis—really the beginning point. A job analysis is a thorough survey of the relative importance of the various skills involved in the job in question and the degree of competency required in regard to each skill.

(Footnotes omitted.) *Vulcan Society* v. *Civil Service Commission*, 360 F. Supp. 1265, 1274 (S.D.N.Y. 1973), *aff'd*, 490 F.2d 387 (2d Cir. 1973).

[48] See also *Fowler* v. *Schwarzwalder*, 351 F. Supp. 721, 726 (D. Minn. 1972):

> While a reading of the test questions prompts the immediate conclusion that they do pertain to the fireman's job and are free of any cultural bias, present standards of psychological science and the law require more than this to validate a test.

[49] For example, Test 21 requires definitions for "adroit" (App. 253), "retrench" (App. 265), "dogmatic" (App. 245), "bounty" as meaning "generosity" (App. 258), "placidity" (App. 272), "promontory" (App. 276), "disparagement" as meaning "depreciation" (App. 272), "evince" (App. 274), and "exigency" (App. 277).

not possibly be relevant.[50] Numerous other questions rely upon prior knowledge or personal opinions which have nothing to do with police work.[51] Some of the questions appear to have no correct answer at all.[52]

The principle of *Griggs*, and of *Albemarle Paper Co.* v. *Moody*, *supra*—that test validation must be proved

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[50] For example, Series 15(b), question 65 asks:

65. The saying "High regions are never without storms" means most nearly
A) Great men seldom disagree.
B) High positions carry many privileges.
C) Great men are constantly beset with troubles.
D) Success is attained through overcoming obstacles.
E) Fortune is emphasized by misfortune.

App. 227. *See also* Series 15(b), questions 22, 49, 52; Series 121, questions 33, 46, 62; Series 173, questions 37, 40, 45, 60.

[51] For example, Series 121, question 54:

54. To merchants, the *chief* advantage of television advertising over magazine advertising is that television advertisements
A) require no effort on the part of the listener
B) reach all prospective customers simultaneously
C) usually reach a greater number of persons
D) may be designed to reach only a desired consumer group
E) can be understood by persons who are unable to read

App. 248, and Series 15(b), question 8:

8. The *chief* reason that many file cabinets are made of metal rather than wood is that metal cabinets
A) can be locked
B) are more attractive
C) do not catch fire
D) weigh less
E) make filing easier

App. 211. *See also* Series 15(b), questions 13, 25, 68, 69; Series 121, questions 25 and 54; and Series 173, question 35.

[52] For example, Series 15(b), question 25:

25. In national forests only certain designated places may be used for camping. Of the following, the chief reason for this restriction is that

continued on next page

and not assumed—has been applied by the lower federal courts throughout the country in dozens of cases involving public employment. These cases are remarkable for their consistency of approach and for their care in reconciling the goal of fair employment with the necessity of maintaining legitimate job qualifications.[53] Proof of test validity where there is adverse

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A) campers may scatter rubbish and spoil scenery
B) unrestricted camping increases the danger of forest fires
C) such sites are protected from animals
D) safe drinking water is provided to these places
E) such places are located where firewood is plentiful

App. 215. *See also* Series 15(b), questions 8, 25, 55; Series 121, question 78; and Series 173, question 25.

[53] *See, Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975); *Boston Chapter, NAACP* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Douglas* v. *Hampton*, 512 F.2d 976 (D.C. Cir. 1975); *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973); *Walston* v. *County School Board of Nansemond County*, 492 F.2d 919 (4th Cir. 1974); *Guardian Association* v. *Civil Service Commission*, 490 F.2d 400 (2d Cir. 1973); *Bridgeport Guardians* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972); *Chance* v. *Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *United States* v. *North Carolina*, 10 E.P.D. 10,438 (E.D.N.C. 1975) (three-judge court); *Bailey* v. *DeBard*, 10 E.P.D. ¶ 10,389 (S.D. Ind. 1975); *Jones* v. *New York Human Resources Administration*, 391 F. Supp. 1064 (S.D.N.Y. 1975); *Arnold* v. *Ballard*, 390 F. Supp. 723 (N.D. Ohio 1975); *United States* v. *Chicago*, 385 F. Supp. 543 (N.D. Ill. 1974); *Wade* v. *Mississippi Cooperative Extension Service*, 372 F. Supp. 126 (N.D. Miss. 1974); *Commonwealth of Pennsylvania* v. *Glickman*, 370 F. Supp. 724 (W.D. Pa. 1974); *Commonwealth of Pennsylvania* v. *Rizzo*, 8 E.P.D. ¶ 9681 (E.D. Pa. 1974); *Officers for Justice* v. *Civil Service Commission of San Francisco*, 371 F. Supp. 1328 (N.D. Cal. 1973); *Afro-American Patrolmen's League* v. *Duck*, 366 F. Supp. 1095 (N.D. Ohio 1973), *aff'd*, 503 F.2d 294 (6th Cir. 1974); *Smith* v. *City of East Cleveland*, 363 F. Supp. 1131 (N.D. Ohio 1973),

impact is required in the published standards of every federal agency entrusted with enforcing laws against employment discrimination.[34] The "face validity" approach articulated by Judge Robb would constitute a repeal of these salutary developments and expose minority group members to disqualification from job opportunities for which they may be fully qualified on the basis of uninformed guesses as to the validity of a test requirement. This must be rejected.

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rev'd, 520 F.2d 492 (1975); *Harper* v. *Mayor and City Council of Baltimore*, 359 F. Supp. 1187 (D. Md. 1973), *aff'd*, 486 F.2d 1134 (4th Cir. 1973); *Erie Human Relations Commission* v. *Tullio*, 357 F. Supp. 422 (W.D. Pa. 1973), *aff'd in part, rev'd in part*, 493 F.2d 371 (3d Cir. 1974); *Shield Club* v. *City of Cleveland*, 370 F. Supp. 251 (N.D. Ohio 1972); *Commonwealth of Pennsylvania* v. *Sebastian*, 368 F. Supp. 854 (W.D. Pa. 1972), *aff'd*, 480 F.2d 917 (1973); *Fowler* v. *Schwarzwalder*, 351 F. Supp. 721 (D. Minn. 1972); *Commonwealth of Pennsylvania* v. *O'Neill*, 348 F. Supp. 1084 (E.D. Pa. 1972), *aff'd, in pertinent part*, 473 F.2d 1029 (3d Cir. 1973); *Western Addition Community Organization* v. *Alioto*, 330 F. Supp. 536 (N.D. Cal. 1971); *Penn* v. *Stumpf*, 308 F. Supp. 1238 (N.D. Cal. 1970); *but cf. Allen* v. *City of Mobile*, 466 F.2d 122 (5th Cir. 1972) (per curiam), *cert. denied*, 412 U.S. 909 (1973). Many additional such cases have been settled and do not appear in the reports.

[34] United States Civil Service Commission, Federal Personnel Manual, Examining, Testing, Standards, and Employment Practices, Sub. Chap. S3-2, 37 Fed. Reg. 21558 (October 12, 1972), also printed in CCH Emp. Prac. Guide ¶ 3890, 3892.06-12; Equal Employment Opportunity Commission, Guidelines on Employment Selection Procedures, 29 C.F.R. § 1607.5, also printed in CCH Emp. Prac. Guide ¶ 4010, 4010.5; United States Department of Labor, Office of Federal Contract Compliance, Testing and Selecting Employees by Government Contractors, 41 C.F.R. § 60-3.5, also printed in CCH Emp. Prac. Guide ¶ 4350, 4350.05.

III. THE DEFENDANTS HAVE REJECTED LESS DISCRIMINATORY ALTERNATIVES WHICH WOULD FULLY SERVE THEIR PURPORTED EMPLOYMENT NEEDS.

In this brief, plaintiffs have argued that Test 21 has a racially discriminatory impact and that this impact is not justified by any showing of meaningful employment relatedness—either to trainability or to job performance. For this dual reason the court of appeals should be affirmed. But even had the defendants established the employment relatedness of Test 21:

> it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest. . . .

Albemarle Paper Co. v. *Moody*, 95 S.Ct. 2362, 2375 (1975). The implication of this language is that employers cannot turn a blind eye to the racial consequences of even valid selection criteria, but must minimize adverse impact on minority groups. Here, the Record indicates that less discriminatory alternatives to its Test 21 policy are, and have been, readily available to the Department.

One alternative is simply to reduce the Test 21 passing score from 40 to 35 as recommended by the Futransky study in 1967. The only justification that the defendants have ever offered for their use of Test 21 is that it screened out potential failures in the former academic training program. But the Futransky study, apparently the only professional study the defendants have of this question, concludes that the passing score on Test 21 should be reduced from 40 to 35. The addi-

tional test passers, according to Futransky, "would be expected to do less well but still good enough to complete the training." App. 100.

As has been noted, p. 15, *supra,* had this recommendation been implemented an additional 1,465 blacks (a 30.9% increase in the black pass rate) and 278 whites (a 4.1% increase in the white pass rate) would have passed between 1968 and 1971.

Another less discriminatory alternative is suggested by reported decisions in several similar cases. In *Arnold* v. *Ballard,* 390 F. Supp. 723 (N.D. Ohio 1975), a case involving the selection of police recruits in Akron, the police department developed a new test to replace one found unlawful. The court found that this new test had been validated in a study based on the requirements of the EEOC Guidelines, that the test was "substantially job related because positive correlations were established" in a concurrent validity study comparing test scores and police job performance, and that there was "no statistically significant difference" between black and white scores on the test. 390 F. Supp. at 731-32. The court described the test development process at length, in an opinion which demonstrates how discrimination can be eliminated while maintaining high selection standards. Similarly, in *Shield Club* v. *Cleveland,* 8 EPD ¶9614 (N.D. Ohio 1974), the Cleveland police department "made the decision to construct a new entrance examination validated for job relatedness, and as free as possible from any cultural racial bias," and succeeded in doing so in an examination given on February 23, 1974. In *Officers for Justice* v. *Civil Service Comm'n of San Francisco,* 371

F. Supp. 1328, 1341 (N.D. Calif. 1973), the San Francisco police department, when ordered to develop new nondiscriminatory hiring tests and procedures without any "lowering of standards," indicated that it could do so promptly. And in *Guardian Assoc.* v. *Civil Service Comm. of New York,* 490 F.2d 400 (2d Cir. 1973), the New York City police department admitted the discriminatory impact of its existing testing procedures and voluntarily advised the court that it would promptly prepare new examinations in compliance with title VII and with the EEOC Guidelines.[55]

These cases, all involving major city police departments, strongly reinforce the conclusion that no real employment need underlies defendants' insistence on continuing the discrimination embodied in Test 21. These cases establish, beyond doubt, that there is ample room for improvement in the MPD's recruit testing program. An affirmance of the decision of the court of appeals will lead to that result.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed, and the case remanded to

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[55] *See also Pennsylvania* v. *O'Neill,* 5 EPD ¶8559 at p. 7620 (E.D. Pa. 1973) (Philadelphia police department "obtaining new qualifying exams" to replace prior discriminatory tests); *U.S.* v. *Chicago,* 385 F. Supp. 543, 562 (N.D. Ill. 1974) (Chicago police department ordered to develop "new hiring and promotion examinations and policies"); *WACO* v. *Alioto,* 514 F.2d 542 (9th Cir. 1975) (San Francisco fire department modified discriminatory examination to make it job related); *Pennsylvania* v. *Rizzo,* 8 EPD ¶9681 at p. 5861 (E.D. Pa. 1974) (new nondiscriminatory test for Philadelphia fire department to be developed by Educational Testing Service in 18 months).

the district court, in accordance with that judgment, for further proceedings relative to remedy.[56]

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December 20, 1975

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[56] *Amicus curiae,* Division 14 of the American Psychological Association, has suggested that the case be remanded to the district court for further exploration of the adequacy of the Futransky Study to support the Department's use of Test 21. The Department, which had the burden of coming forward with evidence of validity, F.R.Civ. P. 56(e), relied solely on the Futransky Study, and the expert affidavits. The Department has never suggested that it possesses additional evidence relative to validity. In these circumstances, the areas that Division 14 suggests could be considered on remand are either deficiencies in the Department's evidence of validity (*e.g.*, lack of evidence of validity of 40 cutoff score), or irrelevant to the issue of the adequacy of the Futransky Study to justify the use of the Test (*e.g.*, the intent of the Department). Div. 14, Bf., pp. 44, 46.